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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1248

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, A CORPORATION,

Cross-Petitioner,

vs.

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK — AMERICA'S PHONE-ORDER FLORISTS, INC., A CORPORATION,

Cross-Respondent.

BRIEF IN OPPOSITION.

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QUESTION PRESENTED.

Where a treble damage judgment has been entered on a jury verdict finding continuing violations of Sections 1 and 2 of the Sherman Act, was the District Court estopped to disregard the judgment and verdict and to enter a separate judgment denying injunctive relief on the ground that no antitrust violation had occurred?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

In addition to Section 16 of the Clayton Act, 15 U. S. C. § 26 (Cr. Pet. 2-3), pertinent to the question presented are:

United States Constitution, Amendment VII:

"In suits at common law, where the value in con-

troversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rules of Civil Procedure, Rule 38(a), (b), and (c). Jury Trial of Right:

"(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constition or as given by a statute of the United States shall be preserved to the parties inviolate.

"(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

"(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. . . ."

Rules of Civil Procedure, Rule 39(a). Trial by Jury or by the Court:

"(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of these issues does not exist under the Constitution or statutes of the United States."

STATEMENT.

Cross-respondent filed a one count antitrust complaint which alleged violations of Sections 1 and 2 of the Sherman Act and prayed for treble damages and injunctive relief (R. 3). The complaint was amended and supplemented at the time of trial to allege that the antitrust violations were continuing (R. 26). At commencement of the action cross-respondent also filed an unqualified demand for "trial by jury in this action" pursuant to Rule 38 of the Federal Rules of Civil Procedure (R. 9).

The evidence offered by cross-respondent at the jury trial is detailed in the pending petition for writ of certiorari in *Florists' Nationwide Telephone Delivery Network—America's Phone-Order Florists, Inc.* v. *Florists' Telegraph Delivery Association,* No. 1132, October Term, 1966. The evidence showed that the Sections 1 and 2 violations were effected through the adoption of membership rules which were intended to destroy cross-respondent's business. The rules were never revoked, modified, or suspended and remained in effect at the date of trial (R. 343). The evidence also showed damage continuing down to the date of trial (Ex. R. 75). On the basis of this evidence the jury returned a general verdict in favor of cross-respondent (R. 39). The District Court entered judgment on the verdict (R. 39) and denied cross-petitioner's motion for judgment notwithstanding the verdict or alternatively for a new trial (R. 48).

At no time either before or during the trial did the District Judge advise the parties that he was conducting a simultaneous non-jury trial on the question of injunctive relief or that he found some issue of fact existed to which cross-respondent was not entitled to a jury trial. Nor did the cross-petitioner request that any issue of fact be tried by the Court.

Following entry of judgment on the jury verdict cross-respondent moved to set for hearing the matter of injunctive relief and the submission of a proposed decree (R. 39). The District Judge denied the motion without comment and subsequently without further hearing or argument *sua sponte* entered findings and conclusions and a separate judgment denying injunctive relief (R. 42-6). The District Judge notwithstanding the jury verdict concluded, "The rules adopted by Defendant Association were not such a restraint upon the activities of Plaintiff as to justify injunctive relief, but rather were measures designed in good faith to preserve and promote fair competition within the same general industry . . ." (R. 44). Cross-respondent's motion to vacate the separate judgment was denied (R. 46-7).

On appeal cross-respondent contended that the District Court was estopped to redetermine the antitrust issues raised by the pleadings contrary to the verdict of the jury. The Court of Appeals agreed, stating (Pet. No. 1132, App. B, p. 35):

> ". . . [T]he doctrine of collateral estoppel operated to preclude the District Court from predicating a denial of injunctive relief on a finding with respect to any essential issue common to both claims which finding is contrary to or inconsistent with the jury's resolution and determination of that same issue as implicitly reflected in its general verdict for FNTDN on the damages claim."

Cross-petitioner does not suggest that the record in the jury trial established some independent ground for denying injunctive relief. Instead it urges that the District Judge as chancellor was free to independently determine the question of antitrust violation and reach a decision contrary to the verdict of the jury.

ARGUMENT.

The judgment entered on the jury verdict necessarily determined that cross-petitioner was engaged in continuing violations of Sections 1 and 2 of the Sherman Act and that the violations were causing continuing injury to cross-respondent's business. See *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 569. Cross-respondent accordingly was entitled to adequate injunctive relief as a matter of right. "All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur." *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333.

The District Court nevertheless denied such relief on the assumption that the jury's determination did not estop him from reexamining the antitrust issues in the case. This was error because the prayers for treble damages and injunctive relief were based on identical complaint allegations. The jury action was tried first and judgment was entered on the verdict prior to the time the District Judge considered cross-respondent's request for injunctive relief. Under these circumstances the prior money judgment created an estoppel as to all matters necessarily determined by the jury's verdict and was binding on the District Judge. *Local 167, I. B. T., Etc.* v. *United States*, 291 U. S. 293; *United States* v. *Munsingwear*, 340 U. S. 36.[1] The court below in reversing the District Court's separate

1. *I.B.T.* held that defendants found guilty of an antitrust violation in a criminal proceeding could not subsequently relitigate the existence of that violation in a companion government suit for injunctive relief. *Munsingwear* similarly held that a prior finding for defendants on a price ceiling violation injunction count precluded the government from proceeding on a separate treble damage count based on the identical violation.

judgment did no more than correctly apply the estoppel principles announced in these decisions.[2]

In order to avoid the estoppel created by the judgment on the jury verdict, cross-petitioner contends that "damage and equity claims were tried simultaneously" (Cr. Pet. 3) because the complaint contained prayers for both legal and equitable relief. The record, however, does not support the contention that "simultaneous" trials were conducted in the District Court. Cross-respondent filed an unrestricted jury demand in which it demanded a jury trial on all issues of fact raised by the pleadings. " 'In the Federal Courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency.' " *Beacon Theatres* v. *Westover,* 359 U. S. 500, 510. See also *Dairy Queen* v. *Wood,* 369 U. S. 469.

Moreover, a simultaneous trial to the Court of issues on which cross-respondent had demanded a jury trial could not have been conducted unless "the Court upon motion or on its own initiative [found] that a right of trial by jury of some or all of these issues does not exist under the Constitution or statutes of the United States" (F. R. C. P. Rule 39(a)). No finding was entered pursuant to Rule 39(a) because a simultaneous trial to the Court was not contemplated by the District Judge or requested by the cross-petitioner. In reality it was the District Court's post-trial action in reexamining fact issues laid to rest by

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2. However, the Court of Appeals erroneously went on to hold that on a new trial cross-petitioner's unclean hands defense, if established, would bar cross-respondent "from both recovery of damages *and injunctive relief.*" This further holding is in conflict with *Kiefer-Stewart Co.* v. *Joseph E. Seagrams & Sons, Inc.,* 340 U. S. 211. See cross-respondent's pending petition for writ of certiorari in No. 1132.

the judgment on the jury verdict which cross-petitioner now characterizes as a simultaneous trial.[3]

But even in the hypothetical case postulated in the cross-petition there would be no place for simultaneous trials of legal and equitable claims for relief where such claims arose out of a common continuing antitrust violation. Such simultaneous trial would permit the unseemly result of two triers of fact reaching contradictory decisions on the same evidence. A similar question was previously considered in *Fitzgerald* v. *United States Lines,* 374 U. S. 16, where this Court held that a maintenance and cure claim joined with a Jones Act claim must be submitted to a jury when both arise out of the same set of facts. This Court observed that "Only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments" (374 U. S. 21). The teaching in *Fitzgerald* is particularly pertinent in private antitrust litigation where the right to trial by jury is "an essential part of the congressional plan for making competition rather than monopoly the rule of trade . . ." (*Beacon Theatres,* 359 U. S. 504).

Any different decision which would allow a District Court independently to determine the existence of an antitrust violation in a case tried to a jury could work an estoppel and thereby " 'limit the [plaintiff's] opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit' " (*Beacon Theatres,* 359 U. S. 504). Where, as here, the money judgment is reversed and the treble damage claim remanded for a new trial, the District

3. Giving the required estoppel effect to the jury verdict in no sense "undermine[s] the time honored equity jurisdiction of the federal courts" (Cr. Pet. 6) or impinges upon the court's discretion in framing the terms of a decree. In this case, however, the District Judge denied injunctive relief altogether because he disagreed with the jury's determination although at the same time he recognized that the verdict could not be set aside as a matter of law.

Court's contrary determination of equitable issues, unless also reversed, might "'operate either by way of res judicata or collateral estoppel so as to conclude [the plaintiff] with respect [to the issue of violation] at the subsequent trial of the treble damage claim'" (359 U. S. 504). Such a result would be clearly contrary to this Court's decision in *Beacon Theatres*. It would also conflict with this Court's command in *Dairy Queen* that where damage claim "issues are common with those upon which respondents' claim to equitable relief is based, the legal claims involved in the action must be determined *prior* to any final court determination of respondents' equitable claims" (369 U. S. 479-80).

CONCLUSION.

While the question presented by the cross-petition is not raised by the record, this Court nevertheless may consider the present case an adequate vehicle for expressing its views on the procedure to be employed in trying antitrust complaints involving demands for legal and equitable relief. For this reason cross-respondent does not oppose issuance of a writ of certiorari.

Respectfully submitted,

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